APPEAL NO. 040416
FILED APRIL 19, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on January 27, 2004. The hearing officer determined that the Independent Review Organization's (IRO) decision, which determined that the spinal surgery proposed for the respondent (claimant) is not medically necessary, is "not supported by a preponderance of the evidence." The appellant (carrier) appeals, contending that the hearing officer's determination is against the great weight and preponderance of the evidence. There is no response from the claimant contained in our file.

DECISION

Affirmed, as reformed.

We reform Finding of Fact No. 1.D. to correct the typographical error which states that the claimant sustained a compensable injury on May 2, 2001. The record reflects that the parties stipulated that the claimant sustained a compensable injury on _____.

We first address the question of whether the hearing officer erred in admitting Claimant's Exhibit Nos. 1-5 offered by the claimant. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(g) (Rule 142.13(g)) provides that the notice setting an expedited hearing, or a hearing held without a prior benefit review conference, shall include time limits for completion of discovery. The hearing officer set a time limit for discovery at 3 days prior to the date of the scheduled hearing. The carrier objected that the claimant's exhibits were not timely exchanged. The hearing officer overruled the carrier's objection based on her determination that the claimant's exhibits were the same as the carrier's exhibits, with the exception of one document from the carrier's required medical examination doctor. To obtain a reversal based upon the asserted error the appellant must show that not only was the admission of the documents error but that the error was reasonably calculated to cause and probably did cause the rendition of an improper decision. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). Upon our review, we find no reversible error.

The hearing officer did not err in concluding that the IRO's decision is not supported by a preponderance of the evidence. The claimant sustained a compensable injury on _____, she had lumbar surgery on January 16, 2003, and her treating doctor recommended further lumbar surgery in order to alleviate the claimant's pain and other symptoms. The carrier disputed the treating doctor's recommendation for lumbar surgery. The Texas Workers' Compensation Commission assigned this case to an IRO. The IRO agreed with the adverse determination of the carrier that the claimant had no need for further lumbar surgery. According to Rule 133.308(v), the IRO's determination is to be given presumptive weight. We have previously addressed

the "presumptive weight" provision of Rule 133.308(v) and determined that it is an evidentiary rule which creates a rebuttable presumption, as distinguished from a conclusive presumption, that the IRO decision is the correct decision which should be adopted by the hearing officer and the Appeals Panel unless rebutted by contrary evidence. *See* Texas Workers' Compensation Commission Appeal No. 021958-s, decided September 16, 2002. In the instant case, the hearing officer found the opinion of the treating doctor, and that of the referral doctor, that the claimant needed further lumbar surgery was sufficient to overcome the presumptive weight afforded to the IRO. The issue presented a question of fact for the hearing officer to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the trier of fact, the hearing officer resolves the conflicts and inconsistencies in the evidence and decides what facts the evidence has established. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The medical records support the hearing officer's determination. Nothing in our review of the record reveals that the challenged determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse that determination on appeal. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The carrier argues that the hearing officer incorrectly characterizes the medical evidence provided by the carrier. The hearing officer referred in her discussion to the medical records of Dr. U (Carrier's Exhibit No. 8) dated May 19, 2003, when the medical records were of Dr. L (Carrier's Exhibit No. 4) dated May 19, 2003. Although the hearing officer mistakenly references the wrong name and exhibit number, the hearing officer correctly references the date of the report and the contents of the report. The mistaken reference of the hearing officer, in her discussion, does not constitute reversible error in light of the record as a whole.

We do not find the hearing officer's decision to be arbitrary and capricious and discern no violation of due process of the law based on the appellant's contention. We perceive no error.

The hearing officer's decision and order are affirmed, as reformed.

The true corporate name of the insurance carrier is **ACE INSURANCE COMPANY OF TEXAS (f/k/a CIGNA Insurance Company of Texas)** and the name and address of its registered agent for service of process is

**ROBIN MOUNTAIN**
**6600 CAMPUS CIRCLE DRIVE EAST, SUITE 200**
**IRVING, TEXAS 75063**.

_____
Veronica L. Ruberto
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Edward Vilano
Appeals Judge